APPENDIX.

No. 12048

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Friday, July 26, 1957

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Walter C. Lindley, Circuit Judge

HENRY M. JUNG, ET AL., ETC.,
Plaintiffs-Appellants,

vs.

K & D MINING CO., INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

The defendants having moved for a dismissal of this appeal on the jurisdictional ground that notice of appeal from the final decision of the trial court had not been filed within the statutory time limit, and upon consideration of the motion, files, and briefs.

IT IS ORDERED and adjudged by this Court that this appeal be, and the same is hereby, DISMISSED, with costs.

No. 12048

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Wednesday, August 14, 1957

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Walter C. Lindley, Circuit Judge

HENRY M. JUNG, ET AL., ETC.,
Plaintiffs-Appellants,

vs.

K & D MINING CO., INC., ET AL.,
Defendants-Appellees.

} Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED by the Court that the last sentence on Page 4 of the Opinion of this Court filed on July 26, 1957 be changed to read as follows:—

> "Consequently, as no amendment was filed within 20 days from the order of May 27, 1955, and no appeal from that order taken within 30 days, it is clear that this Court is without jurisdiction, and that the motion to dismiss must be granted. It is so ordered."

No. 12048

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Tuesday, August 20, 1957

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Walter C. Lindley, Circuit Judge

HENRY M. JUNG, ET AL., ETC.,
Plaintiffs-Appellants,

vs.

K & D MINING CO., INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED that the Motion for rehearing and to vacate the order dismissing the appeal, filed herein on August 9, 1957 be, and the same is hereby Denied.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed and typewritten pages contain a true copy of the

(1) Appendix to Plaintiffs-Appellants' Brief Filed July 2, 1957;

(2) Opinion of this Court Filed July 26, 1957;

(3) Judgment of this Court Entered July 26, 1957;

(4) Order of this Court entered August 14, 1957, modifying the Opinion of the Court; and

(5) Order of this Court entered August 20, 1957, denying the Motion for Rehearing and to Vacate the Order Dismissing the Appeal

in Cause No. 12048

HENRY M. JUNG, ET AL., ETC.,
Plaintiffs-Appellants,

vs.

K. & D. MINING CO., ET AL.,
Defendants-Appellees,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 25th day of October A. D. 1957.

SEAL

Kenneth J. Carrick
Clerk of the United States Court
of Appeals for the Seventh Circuit
By R. Hays Blanchard
Chief Deputy Clerk

Title 28, United States Code, Judiciary and Judicial Procedure

Chapter 81—Supreme Court

Sec. 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Chapter 133—Review—Miscellaneous Provisions

Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Chapter 83—Courts of Appeals

Sec. 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Sec. 1292. Interlocutory decisions.

The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

Chapter 111 General Provisions

Sec. 1653. Amendment of pleadings to show jurisdiction.

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Rules, United States Court of Appeals, Seventh Circuit.

15(f) Jurisdictional Question. Whenever it appears that there is a substantial jurisdictional question in a cause pending on appeal, such question may be raised by either party by motion, to determine the issue as to jurisdiction in advance of hearing on the merits. Such motion shall be made as soon as possible, and when such motion is filed, all further proceedings shall be held in abeyance without further order until due disposition thereof has been made.

25(a) Procedure. Any party desiring a rehearing may, within 15 days after entry of judgment, file . . . a petition for rehearing.

Federal Rules of Civil Procedure

Rule 15. Amended and supplemental pleadings.

(a) Amendments. A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calandar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Rule 73. Appeal to a Court of Appeals.

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to r[illegible] and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rules 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the Appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified,

for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

The Securities Act, as amended, provides:

"The district courts of the United States, the United States courts of any Territory, and the United States District Court for the District of Columbia shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found." (U.S.C.A. Tit. 15, Sec. 77v).

In the

United States Court of Appeals

For the Seventh Circuit

No. 12048 — September Term 1956, April Session 1957

HENRY M. JUNG, et al., etc.,
Plaintiffs-Appellants,

vs.

K. & D. MIXING CO., INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 26, 1957.

Before DUFFY, *Chief Judge*, and LINDLEY, *Circuit Judge*.

LINDLEY, *Circuit Judge*. On May 10, 1955 the district court granted defendants' motion to dismiss plaintiffs' amended complaint, based upon an alleged violation of the Securities Act of 1933 and the Securities Exchange Act of 1934, for failure to state a valid claim. Though the order dismissed the complaint, it provided that plaintiffs have 20 days within which to file an amended complaint.

On May 27, 1955, plaintiffs moved that the order dismissing the complaint be vacated, and, in the alternative, that if the court should overrule plaintiffs' motion to vacate, the time for filing an amended complaint be extended for 20 days. On the same day, the court denied

this motion to vacate, but granted plaintiffs 20 days within which to amend. No amendment was ever filed. Indeed, plaintiffs took no action whatever until March 25, 1957, some 22 months after entry of the order. On that date, they filed a statement that they intended to stand on the amended complaint previously dismissed by the court. On the same day the court entered a second order dismissing the cause of action, from which plaintiffs appealed on April 16, 1957.

Defendants move to dismiss the appeal on the jurisdictional ground that notice of appeal from the final decision of the trial court had not been filed within the statutory time limit. They argue that the order dismissing the complaint with leave to amend entered May 27, 1955 became a "final decision" within the meaning of 28 U.S.C. §1291 upon expiration of the time for filing the second amended complaint fixed by the court.

In considering what constitutes a "final" decision, it has frequently been stated that an order dismissing a complaint does not become final and appealable until the plaintiff expressly elects to stand on his complaint and final judgment is entered in the court. *Crutcher* v. *Joyce*, 134 F. 2d 809 (CA-10); *Riverside Oil and Refining Co.* v. *Dudley*, 33 F. 2d 749 (CA-8). But, in *Stewart* v. *Lincoln-Douglas Hotel Corp.*, 208 F. 2d 379 (CA-7), this court retreated somewhat from rigid adherence to this doctrine. In that case, plaintiff appealed from an order dismissing his suit. Defendant moved to dismiss the appeal on the ground that the order of which complaint was made was of interlocutory character, urging that it lacked finality in that plaintiff had failed to elect expressly to stand on his amended complaint and, further, that no final judgment disposing of the cause of action had been entered. This

court, relying on its decision in *Asher* v. *Ruppa*, 173 F. 2d 10, 11, concluded that the order dismissing the amended complaint was "final" within the meaning of the statute, saying at page 381: " * * * it is clear that the District Court by its order dismissing the complaint intended to and did terminate the litigation; and that plaintiff by promptly taking this appeal elected to stand on this complaint." Thus, we conclude that there were two bases for the determination that the order was final, notwithstanding the absence of a formal judgment dismissing the cause of action, namely, the intent of the court and the action of the plaintiff.

In the case before us, there are two distinguishing characteristics not found in either of the *Stewart* or *Asher* cases. First, the court, in addition to granting the motion to dismiss, granted plaintiffs leave to file a second amended complaint within 20 days. It is clear that during the 20-day period, the order of May 27, 1955 was not appealable, as the allowance of leave to amend precluded finality. *Oppenheimer* v. *Young Co.*, 144 F. 2d 387 (CA-2); *American Broadcasting Co.* v. *Wahl Co.*, 121 F. 2d 412 (CA-2); *Atwater* v. *North American Coal Corp.*, 111 F. 2d 125 (CA-2); *Western Electric Co.* v. *Pacent Reproducer Corp.*, 37 F. 2d 14 (CA-2). As the court in *Western Electric Co.* v. *Pacent Reproducer Corp.*, *supra*, said at page 15: "Clearly the case remains pending in the District Court during the period within which amendment is permitted." However, this does not dispose of our issue, for we are still confronted with the task of determining whether the order of May 27, 1955 became final and appealable upon expiration of the time for making amendment. There is some authority for the proposition that another order is necessary after the time for amendment has passed in order to insure finality. See *Cory Bros. & Co.* v. *United*

States, 47 F. 2d 607 (CA-2). On the other hand, there is at least an implication in the *Western Electric Co.* case that the order automatically becomes final for the purpose of appeal upon expiration of the time for amendment.

Rather than follow rigid procedural formality, it is our duty to determine the intent of the court below, as suggested in our decisions in both the *Stewart* and *Asher* cases. In so doing, the circumstances surrounding the appeal must be taken into consideration. First it is necessary to remember that one of the policy considerations for the "final decision" rule is that of militating against piecemeal appeals. However, in the situation before us, where plaintiffs have failed to amend within the time granted and have taken no action for a period of almost 22 months, it can hardly be correctly urged that to dismiss the appeal will amount to obstruction of that policy. This is true, even keeping in mind the policy of liberality of amendment prescribed by Rule 15 (a), to the effect that leave to amend "shall be freely given when justice so requires", for, obviously, a reasonable time limit should always be imposed. *United States* v. *Newbury Mfg. Co.*, 123 F. 2d 453 (CA-1); *Kelly* v. *Delaware River Joint Commission*, 187 F. 2d 93 (CA-3). Paralleling the impropriety of piecemeal appeals, we have the policy of finality of litigation, which would be frustrated by plaintiffs herein, if, merely by their inactivity and in spite of it, they should be allowed to give new life to a dormant action.

True it is that, unlike the cases of *Asher* and *Stewart*, plaintiffs failed to appeal from the order of May 27, 1955 which affirmative conduct would have constituted an election by them to stand on the complaint. They pursued an opposite course, namely, refrained from taking any action

whatever for an unreasonable period of time. It is rightly urged that by such inaction, they chose to treat the order of the court of May 27, 1955 as final and consequently should be estopped from later action which would have the effect of reviving it. It is properly suggested that the order of March 25, 1957 be declared void. And, it is strongly and soundly urged, that the district court, by concluding that the amended complaint failed to state a cause of action, although granting leave to amend, intended nevertheless to terminate the litigation, if no amendment were filed within the time allowed. Consequently, as no amendment was filed within 20 days from the order of May 27, 1955, and no appeal from that order taken within 30 days, it is clear that this court is without jurisdiction, and that the motion to dismiss must be granted. It is so ordered.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.